

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal No. 2005-42
)	
JOSE GANUZA,)	
)	
Defendant.)	

Attorneys:

Delia Smith, AUSA
St. Thomas, U.S.V.I.
For the Plaintiff,

Marshall Webster, Esq.
St. Croix, U.S.V.I.
For the Defendant

Ramon M. Gonzalez, Esq.
Pro hac vice
For the Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court is Jose Ganuza's ("Ganuza") motion to withdraw his guilty plea.

I. FACTS

On May 10, 2005, the United States Coast Guard ("Coast Guard") boarded a vessel captained by Ganuza. Ganuza and co-defendant, Andrea Mauro, were the only two individuals onboard.

The vessel was sailing north of St. John, Antigua, in international waters, when it was boarded by the Coast Guard. While onboard the vessel, the Coast Guard conducted an ion scan on various parts of the vessel. The scan produced positive hits for cocaine and marijuana. The Coast Guard searched the vessel and recovered approximately 160 kilograms of cocaine in the berth of the vessel. On a subsequent search in October, 2005, an additional 778 kilograms of cocaine were recovered from hidden compartments in the vessel.

On May 16, 2005, the United States charged Ganuza with possession with intent to distribute controlled substances on board a vessel subject to its jurisdiction in violation of the Maritime Drug Enforcement Act. 46 App. U.S.C. § 1903(a). Ganuza was represented by Attorney Stephen Bruschi. Ganuza pled guilty pursuant to a plea agreement. The plea agreement provided that in exchange for Ganuza's substantial assistance, the Government would recommend a downward departure in his sentence.

Thereafter, on March 29, 2006, Ganuza was debriefed by both French and United States authorities. The Government did not file a motion for downward departure. On September 20, 2006, Ganuza filed a motion to enforce the plea agreement which was denied by this Court on November 15, 2006.

Ganuza now moves to withdraw his guilty plea and proceed to

trial. In his motion Ganuza argues that he received ineffective assistance of counsel. More specifically, Ganuza argues that Brusch advised him that if he entered the guilty plea, he was guaranteed a maximum sentence of five years, regardless of the amount of information he was able to give the Government. Ganuza also states that Brusch advised him that the Court would not consider any motions to suppress evidence seized from the vessel without a warrant, or any motion to dismiss the indictment based on a lack of jurisdictional nexus between the alleged criminal violation and the United States.

II. DISCUSSION

Motions to withdraw a guilty plea should be construed in favor of the defendant and granted freely. *See Government of the Virgin Islands v. Berry*, 631 F.2d 214, 219 (3d Cir. 1980) (stating "motions to withdraw guilty pleas made before sentencing should be liberally construed in favor of the accused and should be granted freely"); *United States v. Stayton*, 408 F.2d 559, 560 (3d Cir. 1969) (stating "such requests made before sentencing 'should be construed liberally in favor of the accused' by the trial courts").

Pursuant to Rule 11(d) the court may permit withdrawal of a guilty plea before sentencing if the defendant shows a fair and just reason. *See United States v. Jones*, 336 F.3d 245, 252 (3d

Cir. 2003)(noting that "[t]he burden of demonstrating a "fair and just" reason falls on the defendant, and that burden is substantial"). "A shift in tactics, a change of mind, or the fear of punishment are not adequate reasons to impose on the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty." *United States v. Brown*, 250 F.3d 811, 815 (3d Cir. 2001)

The Court considers three factors in determining whether to grant a motion to withdraw a guilty plea: 1) whether the defendant asserts his innocence; 2) the strength of the defendant's reasons for withdrawing the plea; and 3) whether the government would be prejudiced by the withdrawal. *Brown*, 250 F.3d at 815. There is no absolute right to withdraw a guilty plea. The decision whether to grant a motion to withdraw a guilty plea is within the sound discretion of the Court. *United States v. Crowley*, 529 F.2d 1066, 1072 (3d Cir. 1976).

III. ANALYSIS

A. Assertion of innocence

Ganuza argues that he is legally innocent. An assertion of legal innocence is not sufficient to withdraw a guilty plea. Rather, the Court first considers whether the defendant has asserted his factual innocence. *United States v. Brown*, 250 F.3d

811, 818 (3d Cir. 2001). "Assertions of innocence must be buttressed by facts in the record that support a claimed defense." *Jones*, 336 F.3d at 252-253. Indeed, a defendant's claim of innocence fails where he does not deny that he committed the offense. See *Brown*, 250 F.3d at 818 (rejecting defendant's claim of legal innocence where she failed to assert that she did not commit the crime charged); *United States v. Huff*, 873 F.2d 709, 712 (3d Cir. 1989) (rejecting assertion of innocence where defendant failed to deny that he committed the crime charged).

Here, Ganuza argues that he is legally innocent due to violations of his Fourth, Fifth, and Sixth Amendment rights. However, Ganuza does not argue or present any evidence to show that he denied possessing with the intent to distribute the 938 kilograms of cocaine that were found onboard the vessel. At his plea colloquy, Ganuza testified that he was pleading guilty because he was in fact guilty. Accordingly, Ganuza has failed to meaningfully assert his innocence. See *Brown*, 250 F.3d at 818; *Huff*, 873 F.2d at 712.¹

¹ However, a defendant's failure to assert his innocence does not prevent withdrawal where there is a showing that he is entitled to withdraw his guilty plea. *United States v. Washington*, 341 F.2d 277, 286 (3d Cir. 1965).

B. Strength of reasons for withdrawal

Ganuza argues that he received ineffective assistance of counsel and therefore his plea was not voluntary or knowing. Ganuza asserts that Brusch (1) misinformed him as to the consequences of his plea agreement; and (2) told him that the Court would not consider any motion to suppress evidence seized or to dismiss the indictment, regardless of its merit.

Generally, claims of ineffective assistance of counsel are not reviewed on direct appeal. *United States v. Headley*, 923 F.2d 1079, 1083 (3d Cir. 1991). Rather, such claims are best pursued through a collateral proceeding because they involve questions that can only be resolved after an evidentiary hearing. *See United States v. Thornton*, 327 F.3d 268, 272 (3d Cir. 2003)(noting that when an ineffective assistance of counsel claim is brought on direct appeal, the court is asked to proceed on a record that is not developed precisely for that issue and therefore the record is often inadequate for that purpose).

Here, the record before the Court is not adequate to review Ganuza's claim. As such, Ganuza's ineffective assistance of counsel claim is not properly before the Court at this time.

C. Prejudice to the Government

The Government has not responded to Ganuza's motion. However, the government is not required to show prejudice if the defendant has not met the burden of establishing a basis for withdrawal of his guilty plea. *United States v. Jones*, 336 F.3d at 255; *United States v. Harris*, 44 F.3d 1206, 1210 fn. 1 (3d Cir.1995).

III. CONCLUSION

Ganuza has failed to show that there is a fair and just reason to permit withdrawal of his guilty plea. Accordingly, it is hereby

ORDERED that Ganuza's motion to withdraw his guilty plea is **DENIED**.

Dated: November 5, 2007

Curtis V. Gomez
Chief Judge

ATTEST:
Wilfredo Morales
Clerk of the Court

Copies to:

DEPUTY CLERK

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